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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS,
v.
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER THE NATIONAL MINING ASSOCIATION

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RULE 29.6 STATEMENT

The petitioner does not have a parent company, and no publicly-held corporation has a 10% or greater ownership interest in the petitioner.

INTRODUCTION

Despite hundreds of pages of briefing, Respondents and their supporting amici fail to provide a convincing and reasonable explanation for adopting a rule with annual compliance costs of $9.6 billion and annual benefits of only $4-$6 million. They could have at least attempted to justify this result by arguing that Congress prevented EPA from considering the rule's cost, but they did not do so. Instead, they took the position that Congress left the choice of whether to consider costs in EPA's hands. Nor did they contend that EPA rationally concluded that unquantified benefits and co-benefits tip the cost-benefit analysis in favor of regulation. Despite all their words about those benefits, Respondents were forced to concede that EPA, because it decided to ignore costs, did not weigh costs and benefits in making the appropriateness determination.

Respondents were thus left with the unenviable task of defending the rationality of EPA's position that it could determine whether regulation is "appropriate" without even considering the cost of that regulation. But EPA's position is indefensible either as a matter of statutory construction under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or as a matter of rational decisionmaking under *Motor Vehicle*

Manufacturers Ass'n, Inc. v. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983). Congress did not delegate to EPA the immense power of adopting regulations that are so costly that they are transforming the electric power sector without requiring the Agency to at least consider the impact of its decision. And even if Congress did delegate that authority, no rational person, faced with evidence that the costs of a decision far outweigh its benefits, decides to simply ignore the costs and proceed anyway.

Acid gas regulation proves the point. Regulating acid gases will cost over $5 billion per year yet produce no health benefit (as EPA concedes) and will create only the vaguest of environmental benefits in possibly reducing water-body acidification. None of the Respondents, however, offered a satisfactory explanation of how a Congress that adopted an entire Title devoted to cost-effectively addressing the electric sector's contribution to water-body acidification could have simultaneously intended that EPA would adopt hugely expensive supplemental regulations to achieve virtually no benefit at all.

ARGUMENT

I. Respondents' Statutory Analysis Is Unavailing.

A. Respondents Misread the Plain Text of Section 7412(n)(1)(A).

Respondents' statutory analysis begins with a misreading of what Section 7412(n)(1)(A) actually

says. In Respondents' reading, Congress directed EPA to determine whether it is appropriate and necessary to include electric generators on the Section 7412(c) list. *E.g.*, EPA Br. 17. Because, for other source categories, costs are not a relevant factor in a listing decision, Respondents reason that costs should also not be a factor in a Section 7412(n)(1)(A) appropriate and necessary determination. *Id.* at 24-25. They buttress their analysis by claiming that, under Section 7412 and other Clean Air Act ("CAA") provisions, costs are relevant only later in the regulatory process, when EPA sets standards. *Id.* at 25; State Resp. Br. 28; Brief of American Academy of Pediatrics, et al. ("Env. Resp. Br.") 31.

But Section 7412(n)(1)(A) does not say that EPA shall assess whether *listing* is appropriate and necessary. It directs EPA to determine whether "such regulation"—that is, regulation "under this section [7412]"—is appropriate and necessary. Since, as Respondents state, Congress made costs relevant (either implicitly or explicitly) when EPA sets Section 7412 regulatory standards, EPA must consider costs in making a Section 7412(n)(1)(A) determination of whether regulation under Section 7412 is "appropriate and necessary." Thus, the very fact that EPA must consider costs in adopting Section 7412 regulations proves *Petitioners'* point that EPA must consider costs in the appropriate and necessary finding—and disproves Respondents' point that EPA may ignore costs in making that finding.

B. Respondents' Context Arguments Ignore the Most Basic Statutory Context of All—that Congress Intended a Different Regulatory Approach for Electric Generators.

Respondents' contextual analysis misses an obvious point. On the one hand, they place a great deal of weight on what they call Congress' consistent practice in Section 7412 and throughout the CAA generally of barring EPA from considering costs in making a threshold decision of whether to regulate. EPA Br. 38-41. On the other hand, they are forced to concede that Congress did not follow this practice under Section 7412(n)(1)(A). In their view, under that provision, Congress left it in EPA's hands to make the decision to either consider or not consider costs, unlike any other program they cite. *Id.* at 22-23, State Resp. Br. 18. And so, by Respondents' own admission, a contextual analysis of Section 7412(n)(1)(A) must begin with the recognition that Congress intended a *different* regulatory approach for electric generator hazardous air pollutant ("HAP") emissions than it did for other source categories.[1] *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally

[1] For this reason, Respondents cannot find support in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 469 (2001), where, unlike Respondents' position here, the Court found that the statute unambiguously barred EPA from considering costs.

and purposely in the disparate inclusion or exclusion.").

Respondents maintain nevertheless that because Congress barred EPA from considering costs in making a threshold decision to list sources for regulation under these other programs, EPA must be seen as acting reasonably here by adopting the same regulatory approach. EPA Br. 24-25. Respondents' argument, however, ignores the Section 7412 regulatory structure that Respondents rely on in justifying EPA's approach. As Respondents state, because all of the HAPs that the rule regulates are listed under Section 7412(b), Congress has already deemed that these substances, if emitted in amounts exceeding the Section 7412(c) thresholds, "pose[] an inherent risk warranting regulation." *Id.* at 25. Thus, if Congress' intent was as limited as Respondents claim, it had no need to require EPA to do a health study and make an appropriate and necessary finding. To ensure that electric generator HAP emissions would be regulated if warranted, it could either have not adopted Section 7412(n)(1)(A) at all and left in place a regime under which EPA would be required to regulate those emissions if EPA determined that they exceeded the statutory thresholds. Or, if there was concern that the language of Section 7412(c) was not broad enough for EPA to project forward whether generator emissions following implementation of other CAA programs exceeded the Section 7412(c) tons-per-year criteria for

listing, Congress could have simply instructed EPA to make the necessary forward projection.[2]

Congress did have a purpose for the health effects study and the appropriate and necessary finding, however. The Panel got close to Congress' purpose when it stated that EPA was required to consider the results of the health effects study in determining whether regulation would be appropriate "based on its assessment of the existence and severity" of any health hazards. NMA App. 28a. But the Panel never considered why information about the existence and severity of impacts would be relevant to a Congress that had already determined that HAPs emitted beyond defined threshold amounts create a significant enough health concern to warrant regulation. The only possible explanation is that Congress, in contrast to its otherwise applicable approach, and because of its concern about the multiple, costly regulations which it had adopted for the power sector, wanted EPA to exercise policy judgment as to whether the severity of the impacts warrant the type of regulation "under this section" that EPA has undertaken. That judgment necessarily involves weighing costs and benefits. NMA Br. 35-37. As this Court has said, "[e]very real choice requires a decisionmaker to weigh advantages against disadvantages...." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009).

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[2] The Section 7412(n)(1)(A) health study and appropriate and necessary finding would be similarly unnecessary for facilities emitting below the statutory thresholds. Because these facilities are "area sources," EPA was already required to regulate those sources' emissions if it found they imperil public health or the environment. 42 U.S.C. § 7412(c)(3).

C. The (At Best) Merely Implicit Consideration of Costs Allowed in Setting "MACT-Floor" Standards Proves Rather than Disproves the Relevance of Costs in Determining Whether Regulation Is Appropriate.

Respondents also trip themselves up by arguing that EPA properly ignored costs in making the appropriateness finding because, in line with other CAA programs, EPA would consider costs in fashioning regulatory standards. EPA Br. 25. But EPA did not consider costs in setting standards for electric generators because virtually all of the standards it adopted were based on the "MACT-floor" methodology, NMA Br. 34, which, as EPA has conceded, 77 Fed. Reg. 9,304, 9,323 (Feb. 16, 2012), precludes the consideration of costs.

The best Respondents can do is to argue that costs are implicitly considered in setting MACT-floor standards in that those standards, by definition, have been achieved by some currently operating units. EPA Br. 25-26.[3] Although Respondents recognize that setting standards in this fashion can result in extremely high compliance costs for the large majority of other units and can lead to plant closures, they argue that result is simply the scheme Congress intended. *Id.* at 26. But that claim is directly inconsistent with Respondents' admission that it is

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[3] Actually, by definition, they have been achieved by only a very small number of facilities. Under Section 7412(d)(3)(A), MACT-floor standards are based on the average performance of the 12 percent lowest-emitting units, meaning 88 percent (or even 94 percent) of units may not meet the standard.

EPA that chose to ignore costs here, not Congress. Moreover, Respondents' argument still leaves Congress without a reason for requiring a study of the existence and severity of any health impacts of electric generator HAP emissions and for directing EPA to make an appropriate and necessary finding. Under Respondents' view, EPA does not weigh the severity of impacts against the cost of regulation when EPA makes the appropriate and necessary determination, and, given that MACT-floor standards are formulaic, it also does not do so when it sets regulatory standards.

D. Other Section 7412 Context Supports Congress' Intent that EPA Consider Costs under Section 7412(n)(1)(A).

First, although focused on the health study that Section 7412(n)(1)(A) authorizes, Respondents recognize that the study must also include an examination of alternative control technologies. EPA Br. 28, n.6. Respondents argue improbably that a study of alternative control strategies does not include the cost of those technologies. *Id.* However, the notion that Congress was interested in knowing only whether control technologies were technically feasible, not whether they were economically feasible, is not credible. Many things are technically feasible but completely infeasible as a practical matter because of their cost. Respondents pooh-pooh NMA's point that, under their reading of the statute, EPA could proceed with regulation even if the cost of the controls was $1 trillion, EPA Br. 43, n.13, but that is the implication of their view that only the technical

feasibility of controls was relevant for study, not the cost of those controls.

Second, Respondents recognize the contradiction of relying on Section 7412(n)(1)(B)'s reference to environmental effects to justify consideration of those effects under Section 7412(n)(1)(A), while ignoring costs under Section 7412(n)(1)(A) even though costs are also referred to in Section 7412(n)(1)(B). Indus. Resp. Br. 21, n.9. Respondents argue that EPA's discretion is broad enough under Section 7412(n)(1)(A) to either consider or not consider environmental impacts and to either consider or not consider environmental costs. *Id.* But this argument cuts against Respondents' principal contention that EPA reasonably ignored costs because of Section 7412(n)(1)(A)'s focus on health impacts. Env. Resp. Br. 16; State Resp. Br. 18. This is particularly so given that EPA chose to consider environmental impacts because it wanted to extend its appropriateness finding to acid gases, which, in the amounts emitted by electric generators, do not, as the Agency conceded, create public health impacts. *See* Argument III *infra*. Given that acid gas regulation drives more than half of the cost of the rule, NMA Br. 13, choosing to regulate based on possible environmental concerns, while ignoring the resulting cost impacts, is hardly reasonable.

Third, Respondents argue that ignoring costs in making the appropriateness finding harmonizes with the fact that costs are not considered in delisting a source category under Section 7412(c)(9). EPA Br. 32-34. But the high hurdles for undoing an EPA listing decision further emphasize why Congress

would want to ensure that EPA considered all relevant factors, including costs, before EPA listed generators for regulation under Section 7412.

II. Respondents Provide No Valid Reason for Ignoring Costs Given the Rule's Extraordinarily Unbalanced Regulatory Costs and Benefits.

Even if Congress gave EPA the choice to either consider or not consider costs in determining whether "such regulation" under Section 112 is appropriate, EPA must provide a reasoned explanation for the choice it made. *State Farm Mutual Auto. Insurance Co.*, 463 U.S. at 43-44. Respondents' principal rationale for EPA's decision to ignore the $9.6 billion cost of the rule was that, however extreme the cost-benefit imbalance might be, it cannot be unreasonable because the same imbalance could occur with regulation of other source categories under Section 7412. EPA Br. 19. This explanation, however, suffers from the same problem as EPA's statutory interpretation. No doubt, if Congress had not adopted Section 7412(n)(1)(A) and subjected EPA to the otherwise applicable Section 7412 regulatory structure, this imbalance would have occurred. But Congress did adopt Section 7412(n)(1)(A) and directed EPA to regulate only if "such regulation" was "appropriate." EPA thus must do more to justify the appropriateness of the hugely disproportionate costs and benefits that occurred here than to pretend that Congress never instructed it to determine whether regulation with such consequences is appropriate in the first place.

Respondents seek to justify the enormous costs of the rule by arguing that the costs must be affordable because some facilities have already complied with the standards. State Resp. Br. 2. Given that the initial three-year compliance period expires this April (with many units obtaining a one-year extension to next April), 77 Fed. Reg. at 9,407, it is not surprising that some units have already complied. At the same time, it is no use pretending that $9.6 billion per year is not a steep price simply because facilities are being forced to pay it.

Respondents similarly argue that the rule's costs must be reasonable because the Section 7412 program, in their view, has been successfully implemented for other industries. Env. Resp. Br. 39. But none of those industries have experienced the extraordinary regulatory costs that EPA has imposed on the power sector under the MATS rule, and none has seen the wave of plant closures that is occurring here. Most important, because none are subject to nearly the same level of regulation under other CAA programs, Congress did not specify that EPA must make an appropriateness finding for these other industries before regulating under Section 7412.

Respondents also argue that the costs must be affordable because some states have adopted even more stringent standards, State Resp. Br. 9-11, and some companies have complied with these standards, Indus. Resp. Br. 29. But the States supporting EPA that have adopted these standards (like California and the northeastern states) are typically located far from the country's coal fields and have little coal generation. Similarly, the companies supporting

EPA historically are not large coal users. These companies and these States stand to gain a competitive advantage under the rule, but that does not prove that the compliance costs are reasonable.

In the end, as EPA intended, the rule is having a transformative effect on the electric power sector, with projected retirements of one-sixth to one-quarter of all coal-fired electric generation, NMA Br. 15, which only a few years ago supplied half of the country's electric power. Energy Information Administration, http://www.eia.gov/electricity/capacity/. Congress cannot be seen as having authorized regulation of such "vast economic and political significance," *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014), by instructing EPA to regulate only if "appropriate."

III. NMA's Acid Gas Argument Is Within the Scope of the Issue on Which This Court Granted the Petitions for Writ of Certiorari.

NMA's third argument in its opening brief addressed EPA's alternative justifications for regulating acid gases—first, that regulating acid gases is appropriate and necessary because they contribute to water-body acidification and second, that EPA is compelled to regulate acid gases even if they pose no health or environmental threat if EPA determines that it is appropriate and necessary to regulate any other electric generator HAP. NMA Br. 37-44. Respondents claim that NMA's response to this second justification is not within the scope of the issue this Court set for briefing. EPA Br. 52-53.

Respondents are incorrect. The Court asked the parties to brief whether EPA unreasonably ignored costs. EPA argues alternatively that it could reasonably ignore the benefits and costs of acid gas regulation because those benefits and costs became irrelevant when EPA determined that it was appropriate and necessary to regulate other electric generator HAP emissions. 77 Fed. Reg. at 9,361. NMA maintains that the costs and benefits of acid gas regulation did not become irrelevant when EPA made that determination. NMA Br. 42-44. Given the interplay between Sections 7412(n)(1)(A) and 7412(d), NMA maintains that Congress did not intend that EPA would regulate electric generator emissions that EPA had determined did not "warrant regulation." *Id.* Respondents and NMA dispute this point, but EPA's reasons for ignoring the cost of acid gas regulation are unquestionably relevant to the overall issue of the reasonableness of EPA's decision to ignore the cost of HAP regulation as a whole.

Respondents barely engage the merits of the acid-gas arguments that NMA made. They claim that EPA did find that acid gases harm the public health. Env. Resp. Br. 42, n.7. But their citation is to 76 Fed. Reg. 24,976, 25,050-51 (May 3, 2011), where EPA discusses the health effects of acid gases if inhaled in sufficient amounts. In contrast, they ignore EPA's conclusion in the same Federal Register notice that acid gases in the amount emitted by electric generators (and dispersed over very wide areas) do not pose a cancer risk and that "our case studies did not identify significant chronic non-cancer risks from acid gas emissions." *Id.* at 25,016.

As to environmental impacts, Respondents argument that the study of acidification in the United Kingdom supports EPA's position, Indus. Resp. Br. 42, misses the point that the United Kingdom study obviously does not show that electric generators in the United States emit acid gases in sufficient amounts to affect the acidification levels in domestic water bodies. The fact remains that EPA chose to force the domestic power sector to spend over $5 billion per year to reduce emissions of a substance that EPA concedes does not present a significant health risk and that it cannot provide any concrete evidence is causing material acidification anywhere. It did so even though Congress adopted a separate program that was intended to cost-effectively ameliorate the power sector's contribution to acidification. NMA Br. 25-27. Given the paucity of evidence of any continuing impact that power sector acid gas emissions might be having on acidification, and given the huge costs that EPA's acid gas regulations imposed, EPA's refusal to consider the cost of those regulations was unreasonable.

CONCLUSION

The Court should vacate the rule.

Respectfully submitted,

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INTRODUCTION

The major theme of the respondents' briefs is that Congress intended to treat all of American industry, including electric utilities, the same under 42 U.S.C. § 7412. But if that were Congress's intent, it would have had no reason to write a special provision imposing different criteria for regulating electric utilities. In § 7412(n)(1), Congress created a regime that separates out electric utilities from the § 7412(c) regime that "Congress enacted for all other stationary sources." EPA Br. 44. EPA's starting premise, then—that it should "harmonize" subsection (n)(1) with the rest of the statute by applying the same criteria that would govern if the subsection did not exist at all—is an unreasonable reading of the overall statutory scheme.

EPA's reading of § 7412(n)(1)'s specific language is equally unreasonable. EPA's brief confirms that its interpretation takes the central provision governing EPA's discretion over whether to regulate electric utilities—whether "such regulation is appropriate and necessary," § 7412(n)(1)(A)—and reads the term "appropriate" to be a word entirely redundant with the separate word "necessary." Treating a pivotal statutory term as surplusage is not *Chevron* gap filling; it is rewriting the statute. Here, the statutory text (the word "appropriate," which requires considering relevant circumstances, and (n)(1)(B)'s reference to costs, which shows costs are a relevant circumstance) and the context (Congress giving EPA discretion to decide whether to impose regulation that will affect the entire economy) confirm that it is unreasonable to conclude that costs are irrelevant.

ARGUMENT

I. EPA's interpretation of § 7412(n)(1) treats the word "appropriate" as meaningless and ignores a factor—costs—that Congress intended EPA to consider.

"[Courts] need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 272 (2010). Treating the key term "appropriate" as surplusage is not a reasonable or permissible reading of the statute. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (noting that the Court is reluctant to treat statutory terms as surplusage in any setting, and is "especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme"). Yet that is what EPA's approach to § 7412(n)(1) does: though the provision's focal point for whether EPA should regulate electric utilities is whether EPA concludes it is "appropriate and necessary" to regulate, EPA interprets the statute in a way that deprives the word "appropriate" of any independent meaning. This outcome is especially unreasonable given that "appropriate" has a broad meaning requiring EPA to consider relevant circumstances, EPA Br. 22, and the cost of imposing "such regulation" is a relevant circumstance.

A. EPA's reading unreasonably fails to give "appropriate" any meaning beyond that already ascribed to "necessary."

As its brief makes clear, EPA views § 7412(n)(1) as establishing a "harm-based inquiry" that focuses on the potential public-health hazards that could be

averted by regulating electric utilities. EPA Br. 26. In EPA's view, it is thus "necessary" to regulate if public-health hazards will exist after the imposition of other Clear Air Act requirements. EPA Br. 47 ("the 'necessary' prong considers how those dangers will be affected by the imposition of the Title IV acid-rain program and other CAA requirements.").

The following side-by-side comparison shows that EPA's "necessary" finding fully accounts for the potential public-health benefits of regulating.

Utility Study	"Necessary" finding
"The Administrator shall perform a study of the *hazards to public health reasonably anticipated to occur* as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after the imposition of the requirements of this chapter." § 7412(n)(1)(A) (emphasis added).	"[A]fter implementation of other provisions of the CAA, HAP emissions [i.e., emissions of pollutants listed under § 7412(b)] from U.S. EGUs are *reasonably anticipated to pose hazards to public health*; therefore, it is necessary to regulate EGUs under CAA." 77 Fed. Reg. 9304, 9363 (Feb. 16, 2012) (emphasis added); see also EPA Br. 13.

What work, then, is the word "appropriate" to do? According to EPA, it does the exact same work as "necessary." According to EPA, it is "appropriate" to regulate if (1) "hazardous-air-pollutant emissions from [power] plants pose a hazard to either public health or the environment" and (2) "controls are available to reduce such emissions." EPA Br. 45.

The first of these two criteria for "appropriate" is identical to the criterion EPA applies to "necessary"—the existence of a public-health hazard. This equivalence shows that the first criterion is not providing any independent meaning to "appropriate."

Neither is the second. While EPA contends the availability of controls factored into its "appropriate" finding, the argument is inconsistent with EPA's repeated statements during the rulemaking that it was *required* to find it appropriate to regulate if a hazard exists. E.g., 77 Fed. Reg. at 9326 ("The EPA reasonably concluded that we *must* find it 'appropriate' to regulate EGUs under CAA section 112 if we determine that a single HAP emitted from EGUs poses a hazard to public health or the environment.") (emphasis added); 76 Fed. Reg. at 24,988 ("EPA *must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment.") (emphasis added). If the simple existence of a hazard requires regulation, then the availability of controls is logically irrelevant and therefore not an actual basis for the "appropriate" finding. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

EPA fails to address these key portions of the administrative record, despite being confronted with them in the State Petitioners' opening brief (Br. 21–25). Instead, EPA paraphrases this key portion of the administrative record and, by substituting "may" for "must," changes its core meaning. Compare EPA Br.

12 ("EPA further proposed that it *may* find regulation to be 'appropriate' based 'on a finding that any single [hazardous air pollutant] emitted from power plants poses a hazard to public health or the environment.'" (emphasis added) (citing 76 Fed. Reg. at 24,988)), with 76 Fed. Reg. at 24,988 ("EPA *must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment.") (emphasis added).

EPA's paraphrasing contradicts what it actually said. EPA interpreted "appropriate" to *require* regulation based solely on identifying a hazard to public health or the environment from HAPs emitted by EGUs. This interpretation is unreasonable because Congress directed EPA to determine if regulation of electric utilities is both "appropriate" and "necessary." Rather than give each of those terms their own meaning, EPA interprets *both* "appropriate" and "necessary" to be satisfied if there are hazards to public health after imposition of the requirements of the Act, thereby turning the word "appropriate"—a pivotal term in § 7412(n)(1)'s statutory scheme—into surplusage.

Attempting to avoid this problem with its interpretation, EPA offers a single paragraph to explain how the terms "necessary" and "appropriate" might not "entirely overlap[]." EPA Br. 47. EPA concedes that "both terms require an inquiry into the health dangers posed by power-plant emissions," but appears to suggest that the two terms examine the dangers at different points in time: the "appropriate" finding looks at the "dangers as they exist 'at the

time' the finding is made," while the "necessary" finding "considers how those dangers will be affected [in the future] by the imposition of the Title IV acid-rain program and other CAA requirements." EPA Br. 47. But EPA made both components of the "appropriate and necessary" finding at the same time, and it based both findings on the same evaluation of those dangers—that is, on the Utility Study. Further, the Utility Study itself is forward looking: it looks not just at dangers existing at the time of the finding, but also at public-health hazards "reasonably anticipated to occur" even "after imposition of the requirements of this chapter." § 7412(n)(1)(A). In other words, it looks to the future after the imposition of the Title IV program and other CAA requirements. So EPA's one attempt to identify a difference between its "necessary" finding and its "appropriate" finding falls short.

EPA makes another argument about its interpretation of "appropriate": it contends that it *did* "evaluate[] the severity of anticipated health effects as part of its hazard analysis." EPA Br. 46 n. 16. But EPA evaluated the severity of health effects not when making its "appropriate" finding, but when determining "what constitutes a hazard to public health" in the first place. 76 Fed. Reg. at 24,992. And then it concluded that health effects that are severe enough to rise to the level of a public-health hazard *must* be regulated. E.g., 77 Fed. Reg. at 9326 ("The EPA reasonably concluded that we *must* find it 'appropriate' to regulate EGUs under [§ 7412] if we determine that a single HAP emitted from EGUs poses a hazard to public health or the environment.") (emphasis added). That is why EPA disavowed any

interest in the severity of remaining health hazards from electric utilities when making its "appropriate" finding. Instead, it concluded it "must" find it appropriate to regulate electric utilities under § 7412 if health hazards remain after imposition of the Act's other requirements—a finding it already made under its interpretation of "necessary."

Because EPA's interpretation treats a key statutory term as redundant, it is an unreasonable interpretation of the statute.

B. By asking EPA to exercise its judgment to determine whether regulation was "appropriate," Congress intended that EPA consider both benefits and costs.

Congress did not intend for the word "appropriate" to be surplusage. To the contrary, Congress's use of that word demonstrates its intent for EPA to exercise judgment when deciding whether regulation would be " 'suitable or proper in the circumstances.' " EPA Br. 22 (quoting *The New Oxford American Dictionary* 76 (2d ed. 2005)). To put it simply, Congress directed EPA to decide whether regulation is worth it.

EPA embraces this grant of discretion, conceding that by using the " 'open-ended' " word "appropriate," Congress gave EPA "[s]ubstantial [d]iscretion" to make a policy judgment about whether it was also "appropriate" to regulate electric utilities. EPA Br. 21–23. It also observes that Congress chose not to "set forth an exclusive list of factors relevant to the decision whether to list power plants" under § 7412. EPA Br. 23. But the fact that Congress did not

expressly enumerate the relevant factors suggests that Congress expected EPA to consider all relevant factors, not to limit its judgment to considering *only* the one factor that Congress *did* enumerate—the benefits to public health that would result from regulating. Indeed, it is unreasonable to treat a grant of broad discretion to consider the relevant circumstances as a directive to put on blinders with respect to all circumstances except the one that Congress specifically spelled out. Cf. *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (recognizing that "expansive phrasing" in a statute "points directly away" from applying the interpretative canon that the enumerating one item implies exclusion of others).

EPA also argues that the reference to costs in § 7412(n)(1)(B) does not show that costs are relevant to the "appropriate" finding of § 7412(n)(1)(A), because the statute required EPA to consider the (n)(1)(A) study (the Utility Study), not the (n)(1)(B) study (the Mercury Study). EPA Br. 48. But EPA itself relied on certain components of the Mercury Study (specifically, the fact that it directs EPA to consider the "environmental effects" of emissions) when making the "appropriate" finding. Specifically, in the section addressing its basis for interpreting the word "appropriate," EPA reasoned that "the inclusion of environmental effects *in section 112(n)(1)(B)* indicates Congress's interest in protecting the environment from [hazardous-air-pollutant] emissions from EGUs as well." 76 Fed. Reg. at 24,988 (emphasis added). EPA thought that "Section 112(n)(1)(B) is *direct evidence* that Congress was concerned with environmental effects and cumula-

tive impacts of HAP emissions from EGUs." 76 Fed. Reg. at 24,987 (emphasis added). That reasoning applies with equal force to costs: § 7412(n)(1)(B) is "direct evidence" that Congress was concerned with costs of regulating HAP emissions from EGUs. Indeed, EPA reasoned that subsection (n)(1)(A)'s silence about a factor meant that the factor *should* be considered if that factor was expressly mentioned in (n)(1)(B): "had Congress intended to prohibit EPA from considering adverse environmental effects in the 'appropriate' finding, it would have stated so expressly." 76 Fed. Reg. at 24,988. This reasoning also reinforces the relevance of costs: to paraphrase, had Congress intended to prohibit EPA from considering costs in the appropriate finding, it would have stated so expressly. In this too, EPA's argument that (n)(1)(B)'s reference to costs is irrelevant is inconsistent with its own reasoning on a parallel issue.

C. Congress intended for EPA to consider all relevant aspects of the problem, and costs are an important aspect.

A number of background rules also show that Congress intended for EPA to consider costs. First, Congress was drafting against the background principle of administrative law that reasoned decision-making requires an agency to consider all factors relevant to the problem before it. As this Court explained in 1983 in *State Farm*, an agency action qualifies as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem." 463 U.S. at 43.

Here, the regulatory problem before EPA was whether it was appropriate to impose regulation on

electric utilities. This decision, Congress knew, would have widespread effects on the economy, given electricity's ubiquitous role in keeping things running (lights, technology, heating) in everything from homes to hospitals to recycling plants. Congress also knew that mercury emissions were hazardous (having designated mercury as a hazardous air pollutant, § 7412(b), and having required the Mercury Study, § 7412(n)(1)(B)). By directing EPA not merely to conduct a study but also to take the additional step of deciding whether "such regulation is appropriate and necessary after considering the results of [the Utility Study]," § 7412(n)(1)(A), Congress was instructing EPA to look not just at the public-health hazards but at the whole problem—at the benefits *and* costs of regulating. Congress did not intend for EPA to depart from reasoned decision-making by acting with deliberate indifference to an important aspect of the problem—costs.

Second, when Congress enacted § 7412(n)(1) in 1990, it was drafting against the background principle of statutory interpretation that if Congress had wanted EPA to ignore costs, as EPA contends, Congress would have said so expressly. *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc).

For sources other than electric utilities, Congress did just that. As EPA acknowledges, Congress clearly precluded EPA from considering costs when it established criteria in § 7412(c) for listing "major" sources (the tonnages of hazardous-air-pollutant emissions above which listing is required) and for listing "area" sources (the threats to human health or

the environment that EPA must evaluate). E.g., EPA Br. 36 ("[T]he CAA *unambiguously* precludes consideration of costs in making the decision whether to list *other* source categories" under § 7412(c).) (first emphasis added).

In marked contrast, Congress did not preclude EPA from considering *any* factors; it directed EPA to determine whether regulation is "appropriate," using a broad term that requires EPA to consider the relevant factors. In the wake of the D.C. Circuit's 1987 ruling in *NRDC*, Congress's decision in 1990 *not* to expressly preclude EPA from considering costs in § 7412(n)(1)(A), even as it *did* preclude EPA from considering costs when listing other sources under § 7412(c), supports the plain-language argument that Congress intended EPA to take into account the relevant (and critical) factor of costs when making its appropriate finding. This background rule shows that any negative implications cut *in favor* of considering costs.

Rather than addressing how the D.C. Circuit's decision informed Congress's choice not to preclude EPA from considering costs in § 7412(n)(1)(A), the agency simply summarizes the court of appeals' ruling and contends that the State Petitioners "misread" it. EPA Br. 51. But if we are misreading it, then we are in good company. After all, the D.C. Circuit itself understands *NRDC* to stand for the principle that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Michigan* v. *EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (quoting *NRDC*, 824 F.2d at 1163).

Whitman v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001), does not announce a contrary principle. It merely observes that in cases examining ambiguous sections of the Clean Air Act, the Court has refused to read in "an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* at 467 (citing *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257, & n.5 (1976)). Here, Congress *did* authorize the consideration of all relevant factors, including costs, by telling EPA to decide whether regulation was appropriate. In contrast to both *Whitman* and *Union Electric*, where Congress enumerated specific criteria, see State Pet'rs. Br. 26–27, here Congress did not enumerate factors. Rather, it ordered EPA to consider all circumstances—not just regulatory benefits—relevant to its determination whether to impose regulations. This is not trying to hide an elephant in a mousehole, *Whitman*, 531 U.S. at 468; this is about EPA's refusal to confront the elephant in the room—the enormous costs of its regulation.

Third, EPA does not appear to dispute "the common sense point that it is often reasonable to consider costs in determining whether particular regulatory burdens should be imposed." EPA Br. 19. Here, the decision to regulate means that particular regulatory burdens *will* be imposed. As EPA admits, "[i]f EPA determines that power plants should be listed," "it *must* set emissions standards" under § 7412. EPA Br. 7 (emphasis added). And, according to EPA, that means it *must* impose "floor" emission-reduction standards for which it "does not explicitly consider costs." EPA Br. 25. EPA's approach thus runs afoul of this "common sense point" that costs

are inherently relevant to an agency's decision whether to impose regulations. See State Pet'rs. Br. 29–32; see also Peabody Energy Amicus Br. 2.

II. Congress intended to treat electric utilities differently from all other sources.

A. EPA's decision to treat electric utilities the same as other source categories unreasonably disregards § 7412(n)(1)'s creation of a separate regime for them.

Rather than focusing on § 7412(n)(1)'s text, EPA steps back and looks at what it believes to be the big picture: EPA thought it was reasonable to interpret § 7412(n)(1) "to *harmonize with* the criteria that govern analogous NESHAP listing determinations for other stationary sources," rather than concluding "that Congress intended to *depart from* those criteria." EPA Br. 31. The problem with this argument is that it ignores the fact that Congress *did* expressly depart from those criteria in § 7412(n)(1), and that departure means those listing decisions are not analogous. If Congress wanted to treat electric utilities the same as other sources, it would have had no reason to include subsection (n)(1) in § 7412 in the first place.

EPA concedes that § 7412(n)(1) is "a special listing provision that applies only to power plants" and that it imposes "special requirements." EPA Br. 27. EPA also concedes, indeed emphasizes, that the § 7412(c) program—the National Emissions Standards for Hazardous Air Pollutants, or NESHAP—governs the listing determination for "all other source categories." EPA Br. 17; see also EPA Br. 12

("any other source category"), 18 ("all other stationary sources"), 19 ("all other source categories"), 24 ("all source categories *other than* power plants"), 26, 27, 28, 29, 31, 32, 37, 44 (discussing "the regime that Congress enacted for all other stationary sources"), 45.

EPA thus recognizes that Congress created two different regimes for deciding whether to regulate a source category. Under the § 7412(c) regime that applies to "all source categories *other than* power plants," EPA has little to no discretion when deciding whether to list the source: "Section 7412(c) *requires* the agency to list" any source that emits specific tonnages of hazardous air pollutants (i.e., major sources) or that "present[s] 'a threat of adverse effects to human health or the environment.'" EPA Br. 24, 25 (second emphasis added); see also EPA Br. 4 (acknowledging that in the 1990 amendments, "Congress eliminated much of EPA's discretion"). With respect to the § 7412(c) NESHAP regime, these specific criteria "reflect Congress's determination" about when it is appropriate to regulate. EPA Br. 25. In contrast, under the § 7412(n)(1) regime, EPA has substantial discretion to determine whether to regulate electric utilities based on its judgment as to whether "such regulation is appropriate and necessary." § 7412(n)(1)(A). Congress asked EPA to make the policy decision Congress made for other source categories.

Accordingly, § 7412(n)(1)(A) is not, as EPA mistakenly asserts, merely another threshold listing decision like those under § 7412(c) that focuses solely on hazards to public health or the environment. EPA

Br. 26 (construing "appropriate" to turn on a "harm-based inquiry" comparable to listing decisions under § 7412(c)). Section 7412(n)(1)(A)'s plain language requires EPA to also conduct a *regulation*-based inquiry after it considers the remaining health hazards. That regulation-focused analysis is reflected in the requirement that EPA "shall regulate" electric utilities under § 7412 if, "after considering the results of the study" on health hazards, it finds "*such regulation* is appropriate and necessary." § 7412(n)(1)(A) (emphasis added).

The criteria EPA must therefore apply when making the threshold determination that emissions from electric utilities warrant regulation is fundamentally different than the health-based inquiry for listing other sources under § 7412(c). For electric utilities, Congress mandated that EPA consider not only the remaining public health hazards identified in the study but also whether "such regulation" (that is, emissions standards EPA might develop to address any remaining hazards) would be "appropriate." And by instructing EPA to determine whether it would be "appropriate" to subject electric utilities to those emission standards, Congress required EPA to look ahead to the costs of those standards.

EPA maintains it is "farfetched" to suppose that Congress required EPA to use "fundamentally different" criteria when making the threshold determination whether to regulate electric utilities versus other sources. EPA Br. 32. But there is nothing farfetched about it; that is precisely the scheme Congress created. Congress explicitly established one

set of criteria for electric utilities (the study of public-health hazards and the "appropriate and necessary" finding under § 7412(n)(1)(A)) and a very different set of criteria for all other sources (tonnage quantities for major sources and a risk analysis for area sources under § 7412(c)).

EPA thus ignores the context in which (n)(1)(A) appears in § 7412's overall statutory scheme. And in doing so, EPA violates a basic rule of statutory interpretation: it has adopted an interpretation that is inconsistent with "the design and structure of the statute as a whole." *University of Texas Southwestern Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2529 (2013); see also *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

B. Congress required EPA to consider costs at the threshold stage by creating (n)(1)(A)'s unique "appropriate" finding.

EPA also couches its argument as simply following the same two-step process Congress used elsewhere. EPA asserts that § 7412(n)(1)(A) is "a listing decision for power plants" like EPA's listing decisions for other sources under § 7412(c). EPA Br. 31. Under EPA's view of § 7412's overall scheme, *all* sources are subject to the same "multistage regulatory process" for listing "major" and "area" sources in § 7412(c), under which costs are considered only at the standard-setting second stage and not at the initial listing stage. EPA Br. 38–39. The agency interpreted § 7412(n)(1)(A) as a first-stage, threshold listing decision for electric utilities, like the listing decisions it makes for other sources, in which costs are not considered.

EPA's reading of § 7412 suffers from the same fatal flaw already noted: it ignores the fact that Congress treated electric utilities differently with regard to *when* EPA is to consider costs. Under the criteria it crafted in § 7412(n)(1)(A), Congress required EPA to evaluate health hazards *and* costs when it makes the threshold determination whether electric utilities should be regulated at all. More specifically, Congress directed EPA to evaluate any health hazards that remain after imposition of the Act's requirements, and then, critically, to consider the costs of complying with emission standards by deciding whether "such regulation" under § 7412 is "appropriate"—that is, by deciding whether the benefits from reducing the hazards are worth the costs. In other words, Congress required EPA to consider what the costs would be *before* imposing those costs on electric utilities and consumers of electricity throughout the country.

As EPA notes, the meaning and application of the "appropriate" requirement "depends on the particular context in which the term appears." EPA Br. 22. But EPA and the other respondents fail to acknowledge that in the context "appropriate" is used here (within § 7412(n)(1)(A) itself and in the broader context of § 7412 as a whole), Congress created a different approach for electric utilities than it took for all other sources. In this context, "appropriate" requires EPA to consider both the benefits of reducing any remaining health hazards by regulating electric utilities and the costs of regulation—to decide whether the benefits are worth the costs.

C. Other provisions that apply to other source categories are not comparable to § 7412(n)(1)'s unique approach.

EPA's attempt to analogize § 7412(n)(1)(A) to other sections of the Clean Air Act suffers from the same flaw: they are not comparable. The agency identifies other sections of the Act that establish a "multistage regulatory process" whereby EPA makes a threshold decision in stage one about whether to regulate specific sources or pollutants based on an evaluation of hazards to public health or the environment and then considers costs when setting standards and limits in stage two. EPA Br. 38–39 (discussing the National Ambient Air Quality program, the New Source Performance Standards program, and the Motor Vehicle Emission and Fuel Standards program). What EPA overlooks is that Congress adopted different criteria in § 7412(n)(1)(A) by directing EPA to perform a study of health hazards and then make a finding of whether regulation is "appropriate and necessary." None of the provisions EPA cites has similar language.

EPA's reliance on other statutory provisions in which the word "appropriate" appears is also beside the point, because it misses a basic principle of statutory interpretation: context matters. No one claims (as EPA erroneously suggests) that EPA must consider costs in the context of deciding whether it is appropriate to invite the participation of the Secretary of Agriculture "when conducting a study of pollution damage to ecosystems" pursuant to 42 U.S.C. § 7403(e). EPA Br. 42. The point is not that the word "appropriate" by itself, divorced from any

statutory context, necessarily requires consideration of costs.

But in the statutory context at issue here—(n)(1)(A) and its place within § 7412—Congress used "appropriate" as a criterion for the "stage one" threshold determination for electric utilities, thereby choosing a standard that is fundamentally different from the criteria for making the threshold listing decisions for other sources under § 7412(c). When viewed in context, it is clear that by requiring EPA to decide whether regulation of hazardous-air-pollutant emissions from electric utilities is "appropriate" in light of the remaining health hazards from such emissions after imposition of the Act's other requirements, Congress required EPA to weigh the costs and benefits of such regulation.

III. The delisting provisions in § 7412(c)(9) confirm that Congress established different criteria for when different sources should be regulated.

EPA claims that its interpretation of "appropriate" is reinforced by the delisting provisions in § 7412(c)(9). EPA Br. 18. According to the agency, the fact that costs are not considered when removing a category from the list of sources subject to regulation supports its refusal to consider costs when deciding whether it is appropriate to regulate electric utilities in the first place. *Id.*

Section § 7412(c)(9) supports the opposite conclusion. The delisting provisions are another example of how Congress established different criteria within § 7412 for when sources must be

regulated. In other subsections, *Congress* has established the standards that require EPA to regulate without EPA considering costs (including, for example, the tonnage thresholds above which "major" sources must be regulated).

But for electric utilities, Congress took a very different approach. Rather than use clear language as it did elsewhere to preclude EPA from considering costs, Congress instructed EPA to regulate if it found it was "appropriate" to do so in light of the public-health hazards remaining after imposition of the Act's other requirements. As noted above, Congress thereby intended that *EPA* would evaluate whether the benefits of regulating any remaining health hazards were worth the costs of imposing such regulation on consumers of electricity nationwide and the economy generally.

Thus, the delisting provisions in § 7412(c)(9) and the standards EPA must apply in § 7412(n)(1)(A) are not (as EPA supposes) "two sides of the same coin." EPA Br. 34. The provisions contain wholly different criteria, with one enumerating specific factors for EPA to consider when delisting sources and the other showing that Congress intended that EPA consider costs and benefits when deciding whether is "appropriate" to regulate electric utilities.

IV. The rule's costs ($9.6 billion annually) outweigh its benefits ($4 to $6 million annually).

EPA concludes its brief by arguing that the benefits of the rule will in fact greatly exceed its costs, because the rule would reduce the emissions of

non-hazardous air pollutants, such as particulate matter. EPA Br. 55–56; see also 77 Fed. Reg. at 9305, 9306 ("EPA estimates that this final rule will yield annual monetized benefits (in 2007$) of between $37 to $90 billion," with, according to an accompanying chart, almost all of the benefits—$36 to $89 billion—coming from $PM_{2.5}$-related co-benefits). EPA then argues that it would be "appropriate" to consider these co-benefits and indeed that § 7412(n)(1)(A) "itself reflects Congress's judgment that co-benefits are a valid basis for making regulatory decisions *under the CAA*." EPA Br. 56–57 (emphasis added).

This is a classic case of the tail wagging the dog. Section 7412(n)(1)(A) is about regulating something specific: hazardous air pollutants. So, the cost-benefit analysis must focus on the benefits of reducing those particular pollutants and the costs of the regulation that would create the reductions. State Pet'rs. Br. 48. The benefits of reducing non-hazardous air pollutants do not factor in. And that presumably is why EPA emphatically refused to consider co-benefits in making its finding: as EPA put it when responding to one commenter, "a review of the proposed and final rules utterly refutes [the] commenter's assertion that [particulate matter] reductions form the basis for the appropriate and necessary finding." 77 Fed. Reg. at 9323.

In the end, EPA's argument that the $9.6 billion in costs it refuses to consider are not too high founders on a simple question: If EPA really thought the benefits outweighed the costs, why take the

position that costs are irrelevant? Why not simply conduct a cost-benefit analysis?

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed and EPA's final rule vacated.

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STATE OF MICHIGAN, ET AL.,
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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER UTILITY AIR REGULATORY GROUP, ET AL.

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RULE 29.6 DISCLOSURE STATEMENTS

Petitioner

Utility Air Regulatory Group ("UARG") is an ad hoc, unincorporated association of individual electric generating companies and industry trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Respondents in Support of Petitioner

American Public Power Association ("APPA") is a nonprofit trade association whose members are units of state and local governments that own and operate electric generating, distribution and transmission assets. APPA addresses issues of interest to its members, including those issues related to the development and implementation of requirements under federal and state Clean Air Act programs. APPA does not have any outstanding securities in the hands of the public, nor does APPA have a publicly owned parent, subsidiary, or affiliate.

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally-friendly circulating fluidized bed boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988

for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Gulf Coast Lignite Coalition ("GCLC") is a non-profit corporation organized under the laws of the State of Texas and comprised of individual electric generating and mining companies. GCLC participates on behalf of its members collectively in proceedings brought under United States environmental regulations, and in litigation arising from those proceedings, which affect electric generators and mines. GCLC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in GCLC.

Kansas City Board Of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Rule 29.6 Disclosure Statement because it is a governmental entity organized under the laws of the State of Kansas. Accordingly, no Disclosure Statement is being provided.

White Stallion Energy Center, LLC ("WSEC") is a limited liability company organized under the laws of the State of Texas engaged in the business of energy development and production. Maris Investment Company, LLC, and Sky Global Partners, LLC each hold a 10% or greater ownership interest in it.

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INTRODUCTION

Section §112(n)(1)(A) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §7412(n)(1)(A), requires the U.S. Environmental Protection Agency ("EPA" or "Agency") to decide whether "regulation" of hazardous air pollutant ("HAP") emissions from electric utility generating units ("EGUs") "under this section" is "appropriate and necessary" after considering a study that addresses only two subjects: (1) "hazards to public health" that remain "after imposition of the requirements of this chapter," and (2) "alternative control strategies for emissions which may warrant regulation."

In §7412(n)(1)(A), EPA's first task is to find that a residual public health hazard is posed by specific EGU HAP emissions remaining after those emissions have been reduced under other provisions of the Act, and to identify alternative control strategies to reduce further any emissions that "may warrant regulation." Next, if it finds any remaining EGU HAP emissions pose a health hazard, EPA must determine how to regulate those emissions "under this section."

Different subsections of §7412 provide different decisional standards for regulating HAP emissions "under this section," including subsections (d)(2) ("maximum achievable" control technology); (d)(3) ("floor" control technology); (d)(5) ("generally available control technolog[y]"); (f) ("ample margin of safety"); (m) ("necessary and appropriate"); and (n) itself. Once EPA determines the HAP emissions that warrant regulation and the degree to which those EGU emissions would be regulated under §7412, EPA must resolve whether or not "*such regulation*" under

this section "is appropriate and necessary." Costs, along with potentially myriad other factors, are relevant in applying this broad regulatory decisional standard that concludes the §7412(n)(1)(A) process.

Notwithstanding its mischaracterization of the *Chevron* standard, see National Mining Ass'n Reply Br. 1-2, 9, EPA is right that the interpretive question before the Court is whether the term "appropriate" requires EPA to consider costs "when deciding ... to regulate" EGUs. EPA Br. 21. After correctly stating the question, however, EPA addresses a wholly different question—that is, whether the term "appropriate" makes costs relevant to "listing" decisions under §7412(c). See, *e.g.*, *id.* at 17, 18, 28, 36, 48, 57 (arguing that "appropriate" addresses the threshold "listing" decision).

According to EPA, if any EGU HAP emission threatens "health or the environment" (*i.e.*, satisfies the criteria for "area source" listing under §7412(c)), EPA can find that it is "appropriate and necessary" to list, and that ends EPA's responsibilities under §7412(n)(1)(A). *Id.* at 26. But "to list or not to list" is not the question raised by §7412(n)(1)(A); the question raised by that section is whether additional "regulation" of EGU HAP emissions "under this section" is "appropriate and necessary." The statutory question calls for a decision to authorize or to preclude specific regulation of EGU HAP emissions under §7412.

This Court long ago made it clear that agency decision-making is unreasonable whenever it has "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's failure

to make the §7412(n)(1)(A) finding whether "such regulation" under §7412 is "appropriate and necessary" after considering costs and other consequences of that decision was *per se* unreasonable.

ARGUMENT

This case presents a stark difference in how the parties read §7412(n)(1)(A). According to EPA and its respondents, EPA's obligation under this provision is discharged once EPA concludes that "listing" under §7412(c) is "appropriate and necessary." In Petitioners' view, EPA's obligation under §7412(n)(1)(A) is not discharged until EPA decides on the regulatory standard to apply "under this section"—whether using §7412(d) or some other regulatory metric—and then determines that "such regulation" is "appropriate and necessary." For the reasons discussed below, EPA's construction of §7412(n)(1)(A) is wrong and the Mercury and Air Toxics Standards ("MATS Rule") is unlawful.

I. "Appropriate and Necessary" Is Not Used in §7412(n)(1)(A) to Decide Whether, or Not, to List EGUs Under §7412(c), But Is the Ultimate Decisional Standard Governing Whether or Not to Regulate Under §7412 EGU HAP Emissions That Pose Public Health Risks.

EPA's brief presents a clearly drawn distinction between the parties' positions regarding the role of §7412(n)(1)(A) and the relevance of costs under that provision. According to EPA and its respondents, the phrase "appropriate and necessary" merely describes a "special procedure" related to listing EGUs under §7412(c). EPA Br. 7. As EPA sees it, §7412(n)(1)(A) provides that, once the study of re-

maining EGU health hazards is completed, it is "appropriate and necessary" to list EGUs under §7412(c) when the criteria for listing would otherwise be present after implementation of other EGU emission reductions under the Act. *Id.* at 32 ("[I]t is farfetched to suppose ... Congress required the agency to use listing criteria fundamentally different from those that Congress had mandated for all other stationary-source categories." (emphasis omitted)).

By contrast, in the Utility Air Regulatory Group's ("UARG's") view, the term "appropriate and necessary" calls on EPA to make the ultimate substantive regulatory determination with respect to §7412 regulation of EGU HAP emissions: Specific regulation under §7412 limiting EGU HAP emissions may be adopted by EPA only if "such regulation is appropriate and necessary" after considering remaining public health hazards and alternative control strategies for those HAP emissions that "may warrant regulation." This decisional standard applies at the end of the §7412(n)(1)(A) regulatory process to resolve whether to promulgate, or to reject, a specific type and level of regulation for any EGU HAP emissions posing health hazards. Resolving the nature of EPA's "appropriate and necessary" finding resolves the "contextual" debate in this case.

EPA describes the "appropriate and necessary" language in §7412(n)(1)(A) as "a special procedure that EPA must follow before deciding *whether to list* power plants for regulation under the [national emission standards for hazardous air pollutants ('NESHAP')] program." EPA Br. 7 (emphasis added). Through this prism, EPA and respondents repeat over and over statements to the effect that nothing in "the text of [§7412(n)(1)(A), or in] ... Congress's rea-

sons for enacting it, suggest that Congress wished to encourage (much less require) EPA to consider costs *in making the threshold listing decision*." *Id.* at 18 (emphasis added); see also *id.* at 17, 18, 28, 36 (describing the §7412(n)(1)(A) determination as a threshold "listing" determination). To find that EGU regulation is "appropriate," EPA need only complete its study of remaining hazards and find that, if any remaining EGU HAP emissions pose a threat to "public health or the environment," listing is "appropriate." *Id.* at 11, 26.

Furthermore, because EPA interprets §7412 to require regulation of EGUs the same as other source categories, if a "single" HAP emitted by an EGU "poses a hazard to public health or the environment" requiring listing, EPA must "promulgate standards for all hazardous air pollutants emitted" by EGUs, regardless of cost or hazard. *Id.* at 12, 45 ("[I]f EPA lists power plants ... [under] Section 7412(n)(1)(A), those facilities will be subject to the same standard-setting provisions that govern stationary sources within all other [§7412(c)] listed categories."). Given this interpretation of §7412, EPA continues, §7412(n)(1)(A) "does not mandate distinct 'appropriate and necessary' findings for each individual pollutant [being regulated]" because §7412(c) listing can be triggered by a single HAP. *Id.* at 12. Rather, EPA's §7412(n)(1)(A) responsibilities end with listing EGUs, and Congress's mandate that all HAPs emitted by a source category listed under §7412(c) be regulated under §7412(d) governs everything that follows listing. *Id.* at 30.

If §7412(n)(1)(A)'s only function is, as EPA claims, to confirm that "listing" under §7412(c) is "appropriate" based on a remaining threat to "public health or

the environment," cost would be irrelevant to that narrow decision. See *id.* at 30 n.8 ("Congress would not have expected EPA to consider—at the listing stage—the cost of complying with emission standards that had not yet been formulated."). The contrast between what EPA would have §7412(n)(1)(A) say and the actual language of that provision, however, is striking.

Section 7412(n)(1)(A) calls for EPA to prepare "a study" ("Utility Study") identifying those EGU emissions that pose a "hazard[] to public health" after compliance with other EGU CAA control programs, and then to evaluate alternative control strategies for only those EGU HAP emissions that "may warrant regulation." That Utility Study, and only that Utility Study, was identified by Congress for consideration by EPA in making an "appropriate and necessary" decision under §7412(n)(1)(A). Under the terms of the statute, the Utility Study addresses factors irrelevant to §7412(c) listing (*e.g.*, alternative strategies to control emissions posing health hazards) and ignores two of the three factors relevant to listing (*i.e.*, HAP tonnages and HAP "environmental" threats). In other words, there is a fundamental disconnect between the subject matter of the Utility Study and the criteria for listing. But there is a direct connection between the Utility Study and whether and how regulation of those EGU emissions posing remaining hazards to public health might be regulated "under this section" *if* "appropriate and necessary" (*e.g.*, identification of alternative control strategies for HAP emissions where further reductions may be "warrant[ed]").

Furthermore, under EPA's construction of §7412(n)(1)(A), if the Utility Study had not identified

any EGU HAP emissions that posed a health hazard, EPA could still find that listing is "appropriate" based on an "environmental" risk, and that simple finding would satisfy §7412(n)(1)(A). Following listing, EPA could promulgate §7412(d) standards regulating all EGU HAP emissions—even emissions that pose no residual public health risk—and could promulgate these standards without any evaluation of whether "such regulation" was "appropriate and necessary." EPA Br. 30. That result is not consistent with any reasonable interpretation of the language of §7412(n)(1)(A).

In §7412(n)(1)(A), Congress did not—as EPA claims—"implicitly authorize[] EPA to determine the 'appropriate[ness]' of *such listing*." *Id.* at 23 (emphasis added). Instead, Congress *required* EPA to "*regulate ... under ... section [7412]*" HAP emissions from EGUs that pose residual public health "hazards," but *only "if* the Administrator finds *such regulation is appropriate and necessary* after considering the [study] results." 42 U.S.C. §7412(n)(1)(A) (emphases added). Section 7412(n)(1)(A) does not mention listing because listing is only a precondition to regulation under one subsection of §7412: §7412(d), the subsection under which EPA chose to regulate EGUs in this case. Only after EPA determined what those standards would require could EPA make the "appropriate and necessary" finding called for in §7412(n)(1)(A), as written by Congress: whether or not "*such [§7412] regulation* [of EGU emissions] is appropriate and necessary." *Id.* (emphasis added).

At the time of the 1990 Amendments, EGU HAP emissions had been extensively controlled under other CAA programs and were targeted for substantial further reductions under the 1990 Amendments. See

UARG Opening Br. 9-11. By contrast, the §7412(d) regulatory program was established to bring about expeditious regulation of non-EGU source categories that had avoided regulation under the pre-1990 HAPs emission standards program. Congress made costs (and a whole host of other factors) irrelevant to the §7412(c) listing decision, which must be made as a prerequisite to initiating §7412(d) standard setting.

As enacted by Congress in 1990, only two factors are relevant to listing under §7412(c): whether tonnage thresholds are exceeded (for major sources) and whether emissions pose a "health or environmental" threat (for area sources). In construing EPA's §7412(n)(1)(A) "appropriate and necessary" responsibilities to be fully discharged once EGUs are listed under §7412(c), see, *e.g.*, EPA Br. 26, EPA gives no content to §7412(n)(1)(A)'s direction to EPA to determine whether "such regulation" under this section is "appropriate and necessary." Because §7412(c) listing precedes any regulation of HAP emissions, it cannot discharge EPA's obligation to engage the question whether or not standards under §7412(d) (or any other subsection of §7412 under which the Administrator may choose to regulate) are "appropriate and necessary."

In sum, "appropriate and necessary" is not a finding focused on §7412(c) "listing" It is a finding that must follow the identification of "hazards to public health" in the Utility Study and the determination of how emissions posing a hazard should be regulated "under" §7412. Only after EPA determines the reductions in EGU emissions required by that "regulation" would EPA have the information that it must have to discharge its §7412(n)(1)(A) obligation to determine whether "such regulation" is "appropriate

and necessary." For these reasons, the "appropriate and necessary" finding is an independent regulatory standard that authorizes, limits, or precludes regulation of EGU emissions under §7412. A broad range of factors—including costs—are relevant to that kind of a regulatory judgment.

II. Section 7412(n)(1)(A) Authorizes "Residual Risk" Regulation Only If "Such Regulation" Is "Appropriate and Necessary."

On its face, §7412(n)(1)(A) is a "residual risk" regulatory provision. It focuses exclusively on regulation of "hazards to public health" from EGU HAP emissions that are "reasonably anticipated to occur ... after imposition of ... requirements" of the Act, and requires EPA to determine whether further regulation of EGU HAP emissions that pose public health hazards is "appropriate and necessary." 42 U.S.C. §7412(n)(1)(A). In this context, "appropriate and necessary" requires EPA to make a risk management decision regarding whether and, if so, the degree to which health risks need to be reduced. This is a policy judgment to which cost is relevant. See UARG Opening Br. 26.[1]

In the MATS rulemaking, EPA promulgated three different §7412(d) standards that have significant cost consequence for EGUs: (i) standards for mercury emissions, (ii) standards for emissions of "non-mercury metals," and (iii) standards for "acid gases." The relevance of cost to determining whether

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[1] For these reasons, State Respondents' argument that §7412(n)(1)(A) does not call for a residual risk determination "because no such [§7412] standards have ever been in place" for EGUs, State Resp'ts' Br. 25, profoundly misses the point.

"such regulation" under §7412 is "appropriate and necessary" is illustrated by the consequences of regulation under each of these §7412(d) standards.

In the case of mercury, the §7412(d) standard will cost approximately $3 billion dollars annually, *Amici Curiae* Brief of the Chamber of Commerce of the United States of America, *et al.* in Support of Petitioners ("Chamber Br.") 22, and is claimed by EPA to reduce developmental health risks across the country posed by current and past exposures. Had EPA considered costs, it is unclear whether the Agency would have been able to explain why regulation is "appropriate and necessary" in light of the projected quantitative and qualitative health benefits. See *Amicus Curiae* Br. of Cato Institute in Supp. of Pet'rs. But there is no lack of clarity for the other two §7412(d) standards.

In the case of non-mercury HAP metals, only a small subset of EGUs were projected by EPA to result in public health risks slightly exceeding EPA's one-in-one million *de minimis* risk threshold, and EPA projected no risk for the remaining EGUs subject to the standard. UARG Opening Br. 13. These are risk levels that EPA has determined protect "public health" with an "ample margin of safety" in §7412(f) "residual risk" rulemakings. *Id.* at 8; *Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008). By comparison to these insignificant health risks, the §7412(d) non-mercury metal standards impose control costs of approximately $1 billion annually on all EGUs that emit non-mercury metals. Chamber Br. 22-23.

In the case of acid gases, EPA's standards do not address *any* public health hazard, but only an as-

serted "environmental" threat and will impose annual costs that are almost two times the mercury costs. UARG Opening Br. 19. This $5 billion annual expenditure will result in approximately a 40,000 ton reduction in hydrogen chloride (and lesser amounts of other) acid gas emissions, UARG Pet. App. 442a, all for no health benefit. By shifting the focus of the "appropriate and necessary" determination from "regulation" under §7412 to "listing" under §7412(c), EPA avoided addressing the statutory question: Is "such regulation" "appropriate and necessary" to address residual public health risk.

EPA argues that it is "irrelevant" whether or not §7412(n)(1)(A) addresses regulation of residual risk, asserting that "[t]he fact that a particular CAA provision" like §7412(n)(1)(A) "requires EPA to take account of existing regulatory requirements when deciding whether to impose further regulation" simply has "no bearing" on whether EPA should have "consider[ed] costs in making" its finding to list. EPA Br. 51, 52. That argument fails for the reasons discussed above. Section 7412(n)(1)(A) asks whether or not "regulation" is "appropriate and necessary" in response to a health hazard, not "listing."

More fundamentally, §7412(f)(2)(B) confirms Congress's general approach to regulation of residual risk under §7412. Section 7412(f) is a residual risk provision because its focus is on whether or not to reduce "public health" or "environmental" risks posed by emissions that remain after implementation of control requirements under §7412(d). In the September 1989 *Federal Register* notice referenced by Congress in §7412(f)(2)(B), EPA affirmed that, in determining whether and how to regulate any remaining health risk under the "ample margin of safety

standard," EPA would take into account all "relevant factors including *costs and economic impacts*, technological feasibility, and other factors relevant to each particular decision." 54 Fed. Reg. 38,044, 38,045 (Sept. 14, 1989) (emphasis added). As a result, even if *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987), only held that EPA had "discretion" to consider costs in establishing an "ample margin of safety," EPA Br. 52, EPA exercised its *Chevron* Step Two discretion to give "ample margin of safety" that interpretation after that decision, and Congress adopted that interpretation in the CAA.[2]

Congress included the §7412(n) residual risk provision in the 1990 Amendments because EGUs were already extensively controlled, and those controls would result in significant reductions in EGU HAPs. In the case of acid gases, for example, other CAA programs have resulted in millions of tons of reduction in emissions, at a fraction of the cost of the thousands of tons of acid gas emissions reduction mandated by the MATS Rule.

To conclude that Congress intended to give EPA discretion to negate a carefully crafted, market-based "acid deposition" program established in the 1990 Amendments by allowing EPA to impose command and control regulation on EGU acid gases under §7412 is a bridge too far. Congress's focus on only residual public health hazards in §7412(n)(1)(A), *not*

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[2] Cf. *Natural Res. Def. Council*, 529 F.3d at 1082 ("The word 'interpretation' [as used in §7412(f)(2)(B)] indicates that the savings clause is not limited to EPA's benzene-specific determinations, but *applies broadly to the agency's construction of the Clean Air Act*" as set forth in the benzene standard. (emphasis added)).

both health and environment threats as provided in §7412(f) and (m), took acid gases off the §7412 "regulatory table" for EGUs, leaving a mandate to regulate only as "appropriate and necessary" to reduce remaining health risks. This broad subjective policy judgment requires consideration of all regulatory consequences, including cost.

CONCLUSION

The judgment below should be reversed. Further, because of regulatory extensions granted by certain states, approximately 130 EGUs still face a future compliance date for the MATS Rule, by which they must shut down or install costly control technology. In light of these impending deadlines and the lead-time needed to adjust compliance plans accordingly, UARG requests that, if the rule is remanded for further rulemaking, the Court direct that all future compliance dates be suspended pending any such additional rulemaking, and order such further relief as is necessary based on this Court's decision.

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